A

Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO M-01–40 OF 2004
SURIYADI, RAUS SHARIF AND ZAINUN ALI JJCA
1 JULY 2008

C

Administrative Law — Exercise of administrative powers — Judicial review — Administrative authority faced with two possible interpretations of law in making decision — Administrative authority making decision less favourable to individual applicant — Whether such decision constituted error on face of record — Whether court should interfere with such decision

D

Administrative Law — Judicial review — Application for — Guidelines for applying for leave to obtain judicial review by certiorari — Whether certiorari a discretionary remedy not generally available where there is alternative remedy — Whether certiorari only available in exceptional circumstances where there is alternative remedy

E

Civil Procedure — Judicial review — Certiorari — Application for leave, guidelines — Supporting affidavit, contents of — Jurisdiction of court — Whether court to only act in supervisory capacity — Whether court to be concerned only with legality of decision making process — Whether court could look into merits of impugned decision

F

Revenue Law — Income tax — Appeal — Rights of taxpayer in appeal to Special Commissioners — Whether taxpayer may appeal against assessment directly to civil courts

G

Revenue Law — Income tax — Payment of tax — Whether prompt payment of income tax a statutory obligation on part of taxpayer — Whether taxpayer obliged to first pay up assessed tax notwithstanding dissatisfaction with such assessment

H

The appellant sold its land and notified the IRB. The first respondent charged the appellant with tax on the sale proceeds, and through Form J assessed tax payable under s 4(a) of the Income Tax Act 1967 ('the Act'). The appellant objected to the assessment contending that tax payable should only be

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assessed under the Real Property Gains Tax Act 1976. The appellant filed an appeal to the Special Commissioners through Form Q. Before the appeal could be heard, the appellant applied to the High Court under O 53 of the Rules of the High Court 1980 ('RHC'), for certiorari to quash the notice of assessment ('the Form J'). The application was made on the ground that the Form J was invalid and that it contained an error of law on the face of it. Counsel for the respondents however raised a preliminary objection, arguing, inter alia, that there was an alternative remedy of appeal to the Special Commissioners under s 99 of the Act, which the appellant had already invoked by filing Form Q. The High Court allowed the objection and dismissed the appellant's application with costs. The appellant thus appealed to the Court of Appeal contending that: (i) the first respondent's assessment of the sale proceeds as income tax was flawed; and (ii) the availability of an appeal procedure to the Special Commissioners would not automatically shut out an application for certiorari.

Held, dismissing the appeal with costs:

(1) In an appeal to the Special Commissioners, a taxpayer will have every opportunity to make known his dissatisfaction. He will have the opportunity to tender exhibits, and give oral evidence if necessary. If the taxpayer is successful, the tax paid will be refunded in full. A taxpayer has an additional safeguard. In the event a dispute on questions of law arises, such dispute may be transmitted to the High Court by way of case stated. A taxpayer may come to the courts, but only after he has first come from the Special Commissioners (see para 6); *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163 and *Director-General of Inland Revenue v Lahad Datu Timber Sdn Bhd* [1978] 1 MLJ 203 referred.

(2) Prompt payment to the IRB is not an indulgence on the part of a taxpayer but a statutory requirement. Once the Director-General has made an assessment, and issued a notice of assessment to a taxpayer calling upon him to pay the tax mentioned, the taxpayer must pay up that tax liability within the specific period, even though dissatisfied with that assessment. Any reluctance to pay that tax liability will attract the penalty imposed for late payment (see para 7); *Comptroller of Income Tax v A Co Ltd* [1966] 2 MLJ 282 and *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 referred.

(3) In an application for leave for judicial review under O 53 of the RHC, the supporting affidavit must be sufficiently complete to persuade the judge that the application before him is not frivolous and vexatious and that there is substance in the grounds to support the application. The Court of Appeal would endorse the guidelines established in *Tuan Hj*

Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442 in dealing with an application for leave to obtain the relief of judicial review by way of certiorari under O 53. Certiorari is a discretionary remedy that will fail where there is an alternative remedy (see para 14 & 17–18).

(4) The Supreme Court in *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 held that the courts still have the discretion to act by way of judicial review, but where there is an appeal procedure, certiorari should not normally issue save in exceptional circumstances. In the instant case, the appellant in an attempt to show exceptional circumstances as per *Jagdis Singh*, alleged a 'blatant failure by the first respondent to perform some statutory duty'. However, this allegation was not pleaded in the application. On this basis alone, the court was entitled to dismiss the appeal (see paras 21–24).

(5) A court hearing a certiorari application, sits in a supervisory capacity and is only concerned with the legality of the decision making process. The appellant's allegation that the Form J was invalid and contained an error of law on its face was a question concerning the merits of the assessment. It was a matter better reserved for the Special Commissioners or to be transmitted as a case stated to the High Court (see para 25).

(6) In the instant case, only the Income Tax Act 1967 and the Real Property Gains Tax Act 1976 were applicable and the assessment could fall under either one of these two Acts. If one was chosen over the other, there could not be said to be an error of law on the face of the record. If there was only one possible interpretation and the IRB had rejected it, then a judicial review would be in order. The court will not interfere with an authority's decision on the ground that it has adopted one interpretation but not the other which was favourable to the individual, or that the view adopted by the authority appears to the court to be less reasonable than the alternative construction (see paras 27 & 30).

(7) In the instant case, it was no surprise that the High Court had dismissed the application given that: (i) there was a presumption that the administration exercises its powers in good faith and for public benefit; (ii) the High Court judge found no failure of performance of some statutory duty; (iii) counsel for the appellant had submitted outside his pleadings; and (iv) the pleaded ground had no place in a judicial review application. The case was also a hopeless case on the merits (see paras 33–34).

[Bahasa Malaysia summary

Perayu telah menjual tanahnya dan memaklumkan kepada LHDN.

Responden pertama telah mengenakan cukai ke atas perayu untuk hasil jualan itu, dan melalui Borang J menaksir cukai yang perlu dibayar di bawah s 4(a) Akta Cukai Pendapatan 1967. Perayu telah membantah kepada taksiran itu dengan menegaskan bahawa cukai yang perlu dibayar hanya patut ditaksirkan di bawah Akta Cukai Keuntungan Harta Tanah 1976 ('Akta'). Perayu telah memfailkan rayuan kepada Suruhanjaya Khas melalui Borang Q. Sebelum rayuan dapat didengar, perayu telah memohon ke Mahkamah Tinggi di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), untuk certiorari bagi membatalkan notis taksiran ('Borang J'). Permohonan tersebut dibuat atas alasan bahawa Borang J tidak sah dan mengandungi kesilapan undang-undang padanya. Peguam bagi pihak responden bagaimanapun telah menimbulkan bantahan awal, menghujahkan, antara lain, bahawa terdapat remedi alternatif untuk rayuan kepada Suruhanjaya Khas di bawah s 99 Akta, yang mana telahpun digunakan oleh perayu dengan memfailkan Borang Q. Mahkamah Tinggi telah membenarkan bantahan itu dan menolak permohonan perayu dengan kos. Oleh itu perayu telah merayu ke Mahkamah Rayuan dengan menegaskan bahawa: (i) taksiran responden pertama terhadap hasil jualan itu sebagai cukai pendapatan adalah salah; dan (ii) prosedur rayuan yang sedia ada kepada Suruhanjaya Khas tidak secara automatik menyekat permohonan untuk certiorari.

Diputuskan, menolak rayuan dengan kos:

(1) Dalam rayuan kepada Suruhanjaya Khas, pembayar cukai mempunyai setiap peluang untuk memaklumkan rasa tidak puas hatinya. Dia mempunyai peluang untuk menender ekshibit, dan memberikan keterangan lisan jika perlu. Jika pembayar cukai berjaya, cukai yang telah dibayar akan dibayar balik sepenuhnya. Pembayar cukai mempunyai pelindung tambahan. Sekiranya pertikaian tentang persoalan undang-undang timbul, pertikaian sedemikian boleh dihantar ke Mahkamah Tinggi melalui kes yang dinyatakan. Pembayar cukai boleh datang ke mahkamah, tetapi hanya selepas dia mendapat remedi dari Suruhanjaya Khas terlebih dahulu (lihat perenggan 6); *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163 dan *Director-General of Inland Revenue v Lahad Datu Timber Sdn Bhd* [1978] 1 MLJ 203 dirujuk.

(2) Bayaran segera kepada LHDN bukan menurut kemahuan di pihak pembayar cukai tetapi merupakan keperluan statutori. Setelah taksiran dibuat oleh Ketua Pengarah, dan dikeluarkan notis taksiran kepada pembayar cukai yang memintanya membayar cukai yang dinyatakan, pembayar cukai hendaklah membayar liabiliti cukai tersebut dalam tempoh yang ditetapkan, meskipun berasa tidak puas hati dengan

taksiran tersebut. Keengganan membayar liabiliti cukai tersebut akan menyebabkan penalti dikenakan kerana bayaran lewat (lihat perenggan 7); *Comptroller of Income Tax v A Co Ltd* [1966] 2 MLJ 282 dan *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 dirujuk.

(3) Dalam permohonan untuk kebenaran semakan kehakiman di bawah A 53 KMT, afidavit sokongan hendaklah lengkap secukupnya untuk meyakinkan hakim bahawa permohonan di hadapan beliau tidak remeh dan menyusahkan dan bahawa terdapat alasan kukuh bagi menyokong permohonan itu. Mahkamah Rayuan akan mengindorskan garis panduan yang ditetapkan dalam kes *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442 apabila berurusan dengan permohonan untuk kebenaran memperoleh relief untuk semakan kehakiman melalui certiorari di bawah A 53. Certiorari adalah remedi menurut budi bicara yang akan gagal jika terdapat remedi alternatif (lihat perenggan 14 & 17–18).

(4) Mahkamah Agong dalam kes *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 memutuskan bahawa mahkamah masih mempunyai budi bicara untuk bertindak melalui semakan kehakiman, tetapi di mana terdapat prosedur rayuan, certiorari tidak patut biasanya dikeluarkan kecuali dalam keadaan luar biasa. Dalam kes ini, perayu dalam mencuba untuk menunjukkan keadaan luar biasa seperti dalam kes *Jagdis Singh*, mengatakan bahawa 'kegagalan terang-terangan oleh responden pertama untuk melaksanakan kewajipan statutori'. Walau bagaimanapun, pengataan ini tidak diplidkan dalam permohonan itu. Atas asas ini sahaja, mahkamah berhak menolak rayuan (lihat perenggan 21–24).

(5) Mahkamah yang mendengar permohonan certiorari, bersidang dalam kapasiti penyeliaan dan hanya mementingkan kesahan proses membuat keputusan. Pengataan perayu bahawa Borang J tidak sah dan mengandungi kesilapan undang-undang padanya merupakan persoalan berkaitan merit taksiran itu. Ia perkara yang lebih baik diputuskan oleh Suruhanjaya Khas atau dihantar sebagai kes yang dinyatakan ke Mahkamah Tinggi (lihat perenggan 25).

(6) Dalam kes ini, hanya Akta Cukai Pendapatan 1967 dan Akta Cukai Keuntungan Harta Tanah 1976 terpakai dan taksiran itu boleh terangkum di bawah salah satu daripada Akta tersebut. Jika salah satu dipilih daripada yang satu lagi, tidak boleh dikatakan terdapat kesilapan undang-undang pada rekod. Jika hanya terdapat satu tafsiran yang mungkin dan LHDN telah menolaknya, maka semakan kehakiman boleh diperintahkan. Mahkamah tidak akan campur tangan dengan keputusan pihak berkuasa atas alasan bahawa ia telah menggunakan satu tafsiran tetapi bukan yang satu lagi yang lebih sesuai untuk seorang

individu, atau bahawa pendapat yang digunakan oleh pihak berkuasa dilihat oleh mahkamah sebagai kurang munasabah daripada pentafsiran alternatif (lihat perenggan 27 & 31).

(7) Dalam kes ini, tidak mengejutkan bahawa Mahkamah Tinggi telah menolak permohonan itu kerana: (i) terdapat andaian bahawa pentadbiran menggunakan kuasanya dengan niat baik dan demi manfaat awam; (ii) hakim Mahkamah Tinggi tidak mendapati apa-apa kegagalan pelaksanaan kewajipan statutori; (iii) peguam bagi pihak perayu telah berhujah di luar plidingnya; dan (iv) alasan yang diplidkan tiada tempat dalam permohonan semakan kehakiman. Kes tersebut juga merupakan kes yang tiada harapan berdasarkan merit (lihat perenggan 34–35).]

Notes

For cases on appeal for income tax, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2162–2187.

For cases on application for judicial review, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 191–197.

For cases on judicial review by certiorari generally, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4324–4328.

For cases on judicial review under exercise of administrative powers, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 46–71.

For cases on payment of income tax, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2392–2397.

Cases referred to

Collector of Customs v K Ganga Setty AIR 1963 SC 1319 (refd)

Comptroller of Income Tax v A Co Ltd [1966] 2 MLJ 282, HC (refd)

Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd [1969] 2 MLJ 98, HC (refd)

Director-General of Inland Revenue v Lahad Datu Timber Sdn Bhd [1978] 1 MLJ 203, FC (refd)

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185, SC (refd)

H Co Ltd v Comptroller of Income Tax (East Africa Case Law Vol 1 No 8) (refd)

Hongkong & Shanghai Banking Corporation, Ipoh v Rent Tribunal For Ulu Kinta & Ors [1972] 1 MLJ 70, FC (refd)

R v Chief Constable of Merseyside Police; ex parte Calveley & Ors [1986] QB 424, CA (refd)

R v Secretary of State for the Home Department, ex p Rukshanda Begum (1990) COD 107, CA (refd)

Sun Man Tobacco Co Ltd v Government of Malaysia [1973] 2 MLJ 163, FC (refd)

TCS v Director-General of Inland Revenue (1950–1985) MSTC 209 (refd)

A *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442, SC (refd)
VV Iyer v Jasjit Singh Collector of Customs & Anor AIR 1973 SC 194 (refd)

Legislation referred to

B Courts of Judicature Act 1964 s 25, Schedule, para 1
Income Tax Act 1967 ss 4(a), 99(1), 103(4), 103(5)
Real Property Gains Tax Act 1976
Rules of the High Court 1980 O 53 r 2, O 53 r 3
Stamp Act 1949

C

Appeal from: Judicial Review No MT1–13–4 of 2003 (High Court, Melaka)

Ahmad Musthafi (Tabian Tahir with him) (Koh Kim Leng & Co) for the appellant.

D *Suzana Atan (Senior Federal Counsel, Attorney General's Chambers) for the respondent.*

Suriyadi JCA (delivering judgment of the court):

E

[1] This panel had heard the appeal and at the end of the hearing had dismissed it with costs. We thereupon had affirmed the learned judge's decision. In the course of the hearing learned counsel for the appellant had set out the antecedents of the appeal in the following manner.

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[2] The appellant had filed an application for leave to commence proceedings under O 53 r 3 of the Rules of the High Court 1980, for an order of certiorari to quash and set aside a Form J notice of assessment dated 1 August 2003, issued by the first respondent to the appellant for income tax
G year of 1998. It was also ventilated that, before the case could get off the ground, learned counsel for the respondent had registered a preliminary objection. After the exchange of submissions, the learned judge had acquiesced to the objection and thereafter dismissed the appellant's application with costs. Being dissatisfied the appellant had filed the notice of
H appeal hence the case before us.

[3] I now touch on the factual matrix of the case. The appellant with the intention of establishing a steel mill in Malacca had acquired three pieces of land ('Cheng land'). The steel mill was earmarked to be sited on that Cheng
I land. Regretfully for them, due to various protests by residents against the siting of the steel mill there, what with problems pertaining to the non-conversion of the land title from 'agriculture' to 'industry' by the Malacca State Government, the appellant had no choice but to relocate the steel mill to another site.

[4] With its purpose in acquiring the Cheng land having been frustrated, and to minimise losses, the appellant had applied to convert the usage to 'building'. Despite having received the conversion approval, no steps were undertaken by the appellant to develop it. In 1997, the appellant decided to establish a downstream plant called Group Steel Corporation, and in order to help finance its continuing investment, the appellant liquidated its investment in that Cheng land. The three pieces of land bought in 1991 for RM2,771,423.33 was successfully disposed on 5 March 1997 for RM9,489,577.80.

[5] On 2 April 1997, the appellant submitted the relevant notification of its disposal under CKHT 1 to the Inland Revenue Board. On 1 August 2003, the first respondent issued the notice of assessment Form J for the assessment of income tax for year 1998, despite the objection by the appellant that the land was only subject to real property gains tax and not income tax. That Form J, for some strange reason had made a notation that the gains made by the appellant fell under s 4(a) of the Income Tax Act 1967 by virtue of the authority of *TCS v Director-General of Inland Revenue* (1950–1985) MSTC 209 and *H Co Ltd v Comptroller of Income Tax* (East Africa Case Law Vol 1 No 8). This notation was adverted to as the ground of its application for the certiorari. Being dissatisfied with the assessment in that form, the appellant on 29 August 2003 lodged the relevant prescribed Form Q to the Director-General of the Inland Revenue in order to appeal to the Special Commissioners, a course of action undertaken pursuant to s 99(1) of the Income Tax Act 1967.

[6] Before the Special Commissioners a taxpayer, in this case the appellant, will have all the opportunity to ventilate his disgruntlement, with every opportunity to tender exhibits, and give oral evidence if necessary (*Director-General of Inland Revenue v Lahad Datu Timber Sdn Bhd* [1978] 1 MLJ 203). If the taxpayer is successful the tax so paid will be refunded in full. A taxpayer has an additional safeguard in that in the event a dispute on questions of law is identified it may be transmitted to the High Court by way of case stated. To dispel any fear of a taxpayer, merely because he has to face such an awesome body in the form of the government, Gill FJ in *Sun Man Tobacco Co v Government of Malaysia* [1973] 2 MLJ 163 had occasion to state (at p 165):

> The doors of justice are not shut to him merely because the claimant is the government, but he has to enter the doors of the Special Commissioners first to raise the plea of non-observance of the principle of natural justice or to establish that the Director-General acted arbitrarily and in a non-judicial manner. It is only after he has availed himself of that remedy as laid down by the law that he has a right to come to the courts.

A [7] Apart from lodging the relevant Form Q the appellant also made the first instalment payment as demanded by the assessment notice. It has to be clarified that a prompt payment to the Inland Revenue is not an indulgence on the part of a taxpayer but a statutory requirement. The law on this point is well established, as once the Director General has made an assessment, and
B issued a notice of assessment to a taxpayer calling upon him to pay the tax mentioned, he must pay up that tax liability within a specific period, even though dissatisfied with that assessment. Whether the assessment is right or wrong the tax must be paid notwithstanding any objection or appeal (*Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd*
C [1969] 2 MLJ 98). Any reluctance to pay that tax liability will attract a penalty imposed for late payment; under s 103(4) a penalty of 10% on the unpaid tax if remains unpaid within 30 days of receipt of the assessment and another 5% for the balance under s 103(5) if remains unpaid within 60 days. Choor Singh J in *Comptroller of Income Tax v A Co Ltd* [1966] 2 MLJ 282
D had lucidly summed up the law as regards the need to pay up, on receipt of the notice of assessment, when he observed (at p 284):

> A taxpayer has no right to by-pass the Board of Review (*an entity equivalent to the Malaysian Special Commissioners*) and take his complaint direct to court. And when
E the Comptroller of Income Tax sues a taxpayer to recover tax due under a notice of assessment, the taxpayer cannot be heard to say that the assessment on which the tax has been levied was not made in accordance with the provisions of the ordinance. Such a complaint must in the first instance be laid before the Board of Review... If this is not done every unwilling taxpayer will refuse to pay tax and
F when sued in court will challenge the merits of the assessment, thus causing considerable delay in the collection of tax. The proper course for every aggrieved taxpayer is to pay his tax and present his argument against the assessment made upon him before the Board of Review.
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> (Emphasis added.)

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[8] Before the appeal could be heard by the Special Commissioners the appellant on 8 September 2003 filed the impugned application. The relief sought by the appellant was for an order of certiorari, to move the High
H Court of Malaya at Melaka to quash and set aside the notice of assessment Form J dated 1 August 2003 issued by the first respondent to the appellant, for income tax year of assessment 1998, on the ground that the said Form J was invalid and that it contained an error of law on the face of it. This course of action was undertaken, in spite of the non-finality of the assessment by the
I Director-General as opposed to the decision of the Special Commissioners, a statutory body set up to cater to any appeals by dissatisfied taxpayers.

[9] The decision of the learned judge was meted down on 6 May 2004. Only on 10 January 2007 did the Special Commissioners hear the appeal.

The first date of decision was fixed for 4 January 2008 though unfortunately vacated but with no new date being supplied. A

[10] We now return to the hearing before the learned judge. Counsel for the respondents there had nipped the proceedings in the bud when a preliminary objection was raised, by ventilating that no certiorari could be granted as there was an alternative remedy of appeal pending, the moment the appellant had filed the said notice of appeal (Form Q) on 29 August 2003. In a gist the appellant had yet to exhaust that local remedy. The application thus was alleged to be frivolous and vexatious and had abused the process of the court. B C

[11] The application of the appellant met with instant failure when the preliminary objection was upheld. Despite the understanding that the court was supposed to deal with the preliminary objection first, to be followed by a full blown hearing by affidavit if need be later, parties had prepared written submissions. Even though the appeal records do not contain the written submissions of both parties, it was noted that the written judgment of the learned judge had gone beyond the boundaries of the preliminary objection. The learned judge had dealt with the matter like any full blown hearing, perhaps due to the contents of the missing written submissions, and thereupon decisively made a finding. He had dismissed the matter with costs as being without merit. D E

[12] At the outset we did state that the appeal before us was dismissed with costs. We now supply the reasons for that dismissal. Under O 53 of the Rules of the High Court 1980, an applicant may procedurally seek out the reliefs specified at para 1 of the Schedule to the Courts of the Judicature Act 1964, and for the purposes specified therein. Paragraph 1 of the Schedule to the Courts of Judicature Act 1964 are the additional powers of the High Court, powers in addition to those already seised by it, to issue prerogative writs, wherein a High Court judge may issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose. Section 25 of the Courts of Judicature Act 1964, when read together with para 1 of the Schedule, provides the High Court of that augmented power. For purposes of the current appeal the Ketua Pengarah Hasil Dalam Negeri (Director-General of Inland Revenue) will fall under the reference of 'any person or authority'. Under this source of power the High Court may grant relief in a judicial review whilst the earlier mentioned O 53 of the Rules of the High Court 1980 prescribes the procedure and practice when filing for that judicial review. F G H I

[13] Despite the empowerment by the Courts of Judicature Act 1964 on a High Court judge of those additional powers, such exercise of power must be in accordance with any law or rules. Order 53 r 3 of the Rules of the High Court 1980 is one of those rules that demand certain preconditions, and it reads:

> 3(1) No application under this Order shall be made unless leave therefor has been granted in accordance with this rule.

[14] An application for leave must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on. From the affidavit this panel had managed to gauge the antecedents and the factual matrix of the case. It is in this affidavit too that the applicant must state the particular decision under attack. If the decision was arrived at not in accordance with law then the facts or illegality must be stated in the affidavit. In a nutshell the supporting affidavit must be sufficiently complete to persuade the judge that the application before him was not frivolous and vexatious and that there was substance in the grounds to support the application.

[15] The matter under complaint here was that the Form J sent to the appellant was invalid in law and that it contained an error of law on the face of that document. Before us, as per its written submission the appellant had canvassed that the assessment being subject to income tax, based on the authority of *TCS v Director-General of Inland Revenue* [1950-1985] MSTC 209 and *H Co Ltd v Comptroller of Income Tax* (*East African Case Law Vol 1 No 8*) as indicated by the Inland Revenue, was flawed. The appellant submitted that the above authorities were not applicable to the facts of the case let alone *H Co Ltd v Comptroller of Income Tax* having been severely criticised and was no longer good authority under Malaysian law.

[16] The appellant had further submitted a second argument that mere availability of an appeal procedure to the Special Commissioners will not automatically shut out an application for certiorari. Since the issue in the above paragraph is intertwined with this second argument we will deal with them simultaneously.

[17] It was plain to see that the case of *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1952] 2 MLJ 442 had loomed large in the learned judge's grounds of judgment, though ostensibly to seek out guidelines whether leave ought to be granted or not. We likewise endorse those guidelines. In this case the Federal Court had approved the guidelines laid down in the case of *R v*

Secretary of State for the Home Department, ex p Rukshanda Begum (1990) COD 107 when considering the application of leave. The guidelines are as follows:

(i) The judge should grant leave if it is clear that there is a point for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.

(ii) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.

(iii) If on considering the papers the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That inter partes leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the judge at that inter partes leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award,... namely: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave.

[18] This remedy of certiorari is a discretionary one from which has emerged the proposition that an application will fail where there is an alternative remedy (see *Hongkong & Shanghai Banking Corporation, Ipoh v Rent Tribunal For Ulu Kinta & Ors* [1972] 1 MLJ 70 (FC). In this case Ong Hock Sim FJ had remarked:

> The normal rule is that certiorari will not lie where there is an alternative remedy. (See *Badat bin Drani v Tan Kheat* where the applicant had failed to avail himself of the remedy of appealing to the High Court: and *Melayu Raya Press Limited v Blythe* where the application was refused as the applicants had not exhausted their right of appeal.)

[19] The appellant had taken a step forward, attempting to squeeze through a tiny window of opportunity, by canvassing that recent developments have watered down the effect of the above general view, by referring to the case of *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 ('*Jagdis Singh*'). The facts are as follows:

> The respondent had received notices of additional assessment for income tax for the years 1979 to 1984 inclusive. The respondent's accountant wrote to the Department of Inland Revenue, Ipoh, informing them of the respondent's desire to appeal against the additional assessments. However the respondent filed a notice

of motion for an order of certiorari to quash the said notices of additional assessment. The grounds relied on by the respondent were 'that the notices of assessment are based on conjecture and have been issued maliciously and as a vindictive act'. The learned judge of the High Court granted the respondent's application. The appellants appealed and succeeded at the Supreme Court.

[20] Hashim Yeop Sani SCJ had reviewed a number of British cases in the above case and in the course of it agreed with them. His Lordship approvingly said (at p 189):

> A clear principle is reiterated here ie it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.
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> *In Re Preston* was a tax case. It was quite clear from the speeches of Their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review. But what was also made clear is that remedy by way of judicial review is not to be available where an alternative remedy exists *except in very exceptional cases*.
>
> In answer to the first question we would therefore hold that the discretion is still with the courts but where there is an appeal provision available to the applicant certiorari should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.

[21] The Supreme Court thus in *Jagdis Singh* had held that the discretion is still with the courts to act by way of judicial review, but where there is an appeal procedure available to the applicant, certiorari should not normally issue save in exceptional circumstances (see also *R v Chief Constable of Merseyside Police; ex parte Calveley & Ors* [1986] QB 424).

[22] To repeat the guidelines of *Jagdis Singh*, the exceptional circumstances in the circumstances of this appeal required to be established by the appellant were that:

(i) the first respondent had a clear lack of jurisdiction; or

(ii) there was a blatant failure by the first respondent to perform some statutory duty; or

(iii) there was a serious breach of the principles of natural justice.

[23] In the course of the hearing, this panel had several times asked counsel for the appellant under which category his complaint came under, and his

complaint was that there was a blatant failure by the first respondent to perform some statutory duty. We reproduce parts of the notes of proceedings recorded by us:

> We have shown that there was a blatant failure to perform some statutory duty.
>
> (i) This case (*Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185) was brought to the attention of the High Court.
>
> (ii) We did ventilate the blatant failure to judge.
>
> Court: High Court must have found that there was no blatant failure to perform some statutory duty hence allowing the preliminary objection.
>
> Court: [1987] CLJ (Rep) 115 was considered by Low Hop Bing.
>
> Court: You are saying error in document and not failure to perform statutory duty.

[24] The ground pleaded in the certiorari application was, 'Form J is invalid and that it contains an error of law on the face of the Form J'. In a gist, advertence to 'blatant failure to perform some statutory duty' by the Director-General was never pleaded as one of the exceptional circumstances of the impugned application under O 53 r 2 of the Rules of the High Court 1980. It is trite law that the onus of proving any allegation in support of the leave application is on the appellant, and as it were, even on this basis it had failed, entitling the court to dismiss the appeal without more.

[25] This course of action was taken up, as somehow the appellant had been distracted, eventually to be deviated by the guidelines of *Jagdis Singh*, resulting in the unwittingly failure to discuss this ground. It must be understood that a court listening to a certiorari application sits in a supervisory jurisdiction, and merely to scrutinise the manner the assessment was arrived at by the Director-General. Put another way, the court is only concerned with the legality of the decision making process and not the eventual decision ie that 1998 assessment, in relation to the current case. To state that the impugned Form J is invalid, and that it contains an error of law on the face of that Form J, is a question pertaining to the merits of the assessment, a matter better reserved for the Special Commissioners or a matter to be transmitted as case stated to the High Court.

[26] It was not disputed that the appellant had disagreed with the assessment, in that the profits from the sale of the Cheng land had been assessed under the law of Real Property Gains Tax Act 1976, rather than the Income Tax Act 1967. It was not disputed that the respondent had arrived at the conclusion that the profits be assessed under s 4(a) of the Income Tax Act 1967, and from the face of the records, the assessment was justified by the

A cases of *TCS* and *H Co Ltd*. The appellant on the other hand had alleged that the advertence to the two cases was unsupportable as these two cases had been relegated to irrelevant authorities.

B **[27]** Currently, only the Income Tax Act 1967, Petroleum (Income Tax) Act 1967, Real Property Gains Tax Act 1976 and Stamp Act 1949, impose direct taxes on chargeable income. It is also incontrovertible, for purposes of this case, only the Income Tax Act 1967 and the Real Property Gains Tax Act 1976 are applicable. In such a predicament, where there are only two reasonable interpretations, and the assessment could only fall under one of C these two Acts, and one is chosen over the other as reflected in the assessment notice, that cannot be said to be an error of law on the face of the records (as per the pleadings). If there is only one possible interpretation and the Inland Revenue had rejected it then a judicial review would be in order. Professor MP Jain in *Administrative Law of Malaysia and Singapore*, p 373 had D authored:

> It will not be an error of law apparent on the face of the record where two reasonable interpretations of law are possible and the tribunal has adopted one of them... Mere formal or technical errors of law do not attract judicial review.

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[28] In *Collector of Customs v K Ganga Setty* AIR 1963 SC 1319, the facts were that the respondent had imported from Australia a quantity of oats which was described in the indent, contract and shipping documents as 'standard feed-oats'. The commodity imported consisted of oats in whole F grain. The question raised related to the proper classification of the goods, imported under the Import Trade Control Schedules, during the period July to December 1952, when the consignment reached India. The controversy centered round the point whether the 'feed-oats' fell within item 42 or within item 32 of the Circular.

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[29] Ayyangar J there had stated:

> This court proceeded on the basis that it is primarily for the Import Control authorities to determine the head or entry under which any particular commodity H fell; but that in doing so, these authorities adopted a construction which no reasonable person could adopt ie, if the construction, was perverse, then it was a case in which the court was competent to interfere. In other words, if there were two constructions which an entry could reasonably bear, and one of them which was in favour of revenue was adopted, the court has no jurisdiction to interfere I merely because the other interpretation favourable to the subject appeals to the court as the better one to adopt.

[30] In *VV Iyer v Jasjit Singh Collector of Customs & Anor* AIR 1973 SC 194 the court, in similar vein, had said as per the brief note:

> Where two alternative interpretations are possible of the scope and applicability of Item 74(vi) of Part V of Schedule I to Imports (Control) Order 1955 made under s 3(1) of Imports and Exports (Control) Act 1947, and Customs authorities adopt a reasonable view relating thereto — which is favourable to Revenue, such finding of the authorities cannot be interfered with by the High Court under art 226 even though another view contrary to one adopted is in favour of the subject.

[31] The above two cases may be summed up this way: a court will not interfere with an authority's decision on the ground that it has adopted one interpretation but not the other which was favourable to the individual, or that the view adopted by the authority appears to the court to be less reasonable than the alternative construction.

[32] It was also obvious from the above notes of proceedings that *Jagdis Singh* was brought to the attention of the learned judge and that he had arrived at a finding of fact that no blatant failure to perform some statutory duty had taken place. This was obvious as he had arrived at a finding when he opined:

> On the following grounds, in particular the judgment of the Supreme Court in *Jagdis Singh*, I hold that the instant application is wholly without merits.

[33] To satisfy our requirements, this panel had taken the additional step of scrutinising the supporting affidavit of the appellant, and conclude whether any allegation was made against the Director-General for blatantly failing to perform some statutory duty. Regretfully we failed. The only allegation made against the Director-General was found at para 32 of the supporting affidavit, but the assertions went into the merits of the assessment, matters which could be dealt with by the Special Commissioners or if need be, to be transmitted to the High Court.

[34] To wind up the matter, with there being a presumption that the administration exercises its powers in good faith and for public benefit, what with the learned judge having found no failure of performance of some statutory duty, followed by learned counsel for the appellant submitting outside the periphery of his pleadings, compounded further by the fact that the pleaded ground has no place in a judicial review application, it was no surprise that the learned judge had dismissed this application.

[35] With the failure by the appellant to establish that an exceptional circumstance exists, the legal precept that a local remedy is available, and have yet to be exhausted, thereupon will return to the forefront for consideration. The inevitable outcome, after considering all the facts again, is that the leave application must be dismissed as no arguable case had been made out by the

appellant. It will be pointless to grant leave, even if the appellant were to have sufficient interest over the matter, if it is crystal clear that its case is a hopeless one on its merits; or the appellant's case rests only on non-justiciable issues. Founded on the above grounds we had no compunction in dismissing the appeal with costs. The High Court decision was affirmed and the deposit ordered towards account of taxed costs.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon